

National Security or Unnecessary Secrecy? Restricting Exemption 1 to Prohibit Reclassification of Information Already in the Public Domain

AMANDA FITZSIMMONS*

“For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion.” —Justice Potter Stewart¹

Abstract: Due to increased concern for national security, critics have argued that agencies are unnecessarily allowing access to documents that could be used in future terrorist attacks. In response to such concerns, agencies have secretly and steadily removed thousands of declassified documents from the public purview and reclassified them. Some of these documents have been in the public domain for more than three decades.

Reclassification of information in the public domain undermines the policy aims underlying the Freedom of Information Act; reclassification deters public access to necessary and useful information and is unlikely to prevent a determined terrorist from accessing such information. This comment argues that the legal bases

* J.D., University of San Diego School of Law, May 2008; B.A. Journalism, San Diego State University, May 2004. I would like to thank my wonderful husband and family for their support, as well as my advisor Daniel Rodriguez, Minerva House Drysdale Regents Chair in Law at the University of Texas-Austin, my comment editor Christine Yung, and the editors of *I/S: A Journal of Law and Policy for the Information Society* for their editing and contributions to this comment.

¹ New York Times Co. v. United States (*The Pentagon Papers Case*), 403 U.S. 713, 729 (1971).

that permit agencies to remove such information from the public domain need to be restricted in the form of increased agency accountability, judicial oversight, and legislative amendment.

I. INTRODUCTION: COLD WAR MISSILE BLACKOUT

The National Security Archive ("Archive") is an independent research institute and library located at George Washington University that collects and publishes declassified documents obtained through the Freedom of Information Act ("FOIA").² In August 2006, the Archive reported that the Pentagon and Department of Energy had started designating as "secret" information about the Cold War that for many years had been disclosed to the public, including Cold War enemy, the former Soviet Union.³ The information subject to the blackout included the numbers of strategic weapons, including Minuteman, Titan II, and other missiles in the U.S. nuclear arsenal during the Cold War.⁴ As the legal basis for such reclassifications, the agencies cited Exemption 1 of FOIA (the national security exemption), claiming that such disclosures posed a danger to national security.⁵

Over the years, FOIA fostered openness between the United States government and its citizens, journalists, and private organizations.⁶ However, the events of September 11, 2001 have caused an executive reassessment of the government's disclosure of information, specifically disclosures made pursuant to FOIA requests.⁷ As agencies

² NATIONAL SECURITY ARCHIVE, 2005 ANNUAL REPORT 11 (2006), *available at* <http://www.gwu.edu/~nsarchiv/nsa/2005%20Annual%20Report.pdf>.

³ Christopher Lee, *Cold War Missiles Target of Blackout*, WASH. POST, Aug. 21, 2006, at A1.

⁴ See William Burr, *How Many and Where Were the Nukes? What the U.S. Government No Longer Wants You to Know about Nuclear Weapons during the Cold War* (Aug. 18, 2006), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB197/index.htm> (showing the juxtaposition of documents released more than 30 years ago without the redactions found on the same documents released in 2006).

⁵ *Id.*; see also Lee, *supra* note 3.

⁶ DAVID DADGE, *CASUALTY OF WAR: THE BUSH ADMINISTRATION'S ASSAULT ON FREE PRESS* 148 (2004); CHARLES S. STEINBERG, *THE INFORMATION ESTABLISHMENT: OUR GOVERNMENT AND THE MEDIA* 20 (1980).

⁷ Compare Memorandum from John Ashcroft, Attorney General, to Heads of All Departments and Agencies, The Freedom of Information Act (Oct. 12, 2001), *available at* <http://www.usdoj.gov/o4foia/O11O12.htm> [hereinafter Ashcroft Memorandum], and Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff, to the Heads of Executive Departments and Agencies, Action to Safeguard Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to

began damming the flow of information to the public, they also began reclassifying already public information under Exemption 1.⁸

The Archive's report about the Cold War missile blackout is one of the many recent examples of an agency reclassifying information already in the public domain.⁹ Despite agency assertions that these reclassifications have been in the interest of national security, there is increasing concern that they are simply the result of unnecessary secrecy.¹⁰ In an interview with the *Washington Post*, William Burr, a senior analyst at the Archive, said, "It would be difficult to find more dramatic examples of unjustifiable secrecy than these decisions to classify the numbers of U.S. strategic weapons. The Pentagon is now trying to keep secret numbers of strategic weapons that have never been classified before."¹¹

Executive fears that FOIA requests will lead to the dangerous disclosure of national secrets are not new. Since FOIA's inception,¹² there has been a constant struggle to balance the public's need to

Homeland Security (Mar. 21, 2002), available at <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm> [hereinafter Card Memorandum], with Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies, The Freedom of Information Act (Oct. 4, 1993), available at <http://www.fas.org/sgp/clinton/reno.html> [hereinafter Reno Memorandum].

⁸ See, e.g., Burr, *supra* note 4; OMB Watch, Access to Government Information Post September 11th, <http://www.ombwatch.org/article/articleview/213/1/104> (last visited Mar. 28, 2008) (tracking information removed from agency websites after September 11th); THE REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, HOMEFRONT CONFIDENTIAL: HOW THE WAR ON TERRORISM AFFECTS ACCESS TO INFORMATION AND THE PUBLIC'S RIGHT TO KNOW 59 (2005) [hereinafter HOMEFRONT CONFIDENTIAL].

⁹ See DADGE, *supra* note 6, at 146–51; Susan Nevelow Mart, *Let the People Know the Facts: Can Government Information Removed from the Internet be Reclaimed?*, 98 LAW. LIBR. J. 7, 15 (2006) (citing examples where the Environmental Protection Agency and Federal Energy Regulatory Commission have improperly used national security as an excuse to remove information from the public's reach); William J. Broad, *U.S. is Tightening Rules on Keeping Scientific Secrets*, N.Y. TIMES, Feb. 17, 2002, at A1.

¹⁰ See Burr, *supra* note 4; HOMEFRONT CONFIDENTIAL, *supra* note 8; HAROLD C. RELYEA, LIBRARY OF CONGRESS, SECRECY VERSUS OPENNESS: NEW PROPOSED ARRANGEMENTS FOR BALANCING COMPETING NEEDS 1 (2004), available at <http://www.fas.org/sgp/crs/RS21895.pdf>; Ted Bridis, *LBJ Had Doubts about the Freedom of Information Act*, HOUSTON CHRON., July 4, 2006, at A15; Leonard Pitts Jr., Editorial, *Pursuit of 'Top Secret' Goes Way Over the Top*, BALT. SUN, Aug. 27, 2006, at A23.

¹¹ Lee, *supra* note 3.

¹² A full text of the Freedom of Information Act can be found at 5 U.S.C. § 552 (2006).

know with the nation's security interests.¹³ When President Lyndon B. Johnson signed FOIA into law forty years ago,¹⁴ he did so despite deep reservations that the Act might result in the disclosure of secrets that might eventually harm the country.¹⁵ In fact, President Johnson almost used a pocket veto before ultimately buckling under pressure from journalists and other FOIA supporters.¹⁶ The events of September 11th have only complicated this struggle for balance.¹⁷

To allow for these concerns, FOIA contains certain exemptions that give agencies the power to deny the disclosure of certain types of information.¹⁸ In a majority of the recent reclassifications, agencies have claimed Exemption 1 as the legal basis for denying whole requests or redacting classified information from documents before they are disclosed.¹⁹ Exemption 1 of FOIA provides that an agency is not required to disclose documents that are (a) specifically authorized under criteria established by an Executive Order to be kept secret in

¹³ *FOIA Hearing: Hearing Before the Committee on Government Reform*, 109th Cong. 1 (2006) [hereinafter *FOIA Hearing*] (opening statement of Todd Russell Platts, Chairman of Committee on Government Reform).

¹⁴ When FOIA was initially introduced during the Moss hearings, it featured some interesting role reversals, with then-Congressman Donald Rumsfeld as a FOIA supporter and then-White House aide Bill Moyers as a FOIA opponent. National Security Archive, *Freedom of Information at 40*, July 4, 2006, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/index.htm> [hereinafter *Freedom of Information at 40*].

¹⁵ *Id.*

¹⁶ *Id.* In addition to signing the bill, Johnson issued a signing statement that undercut the thrust of the law. Before being released to the public, a portion of the statement was changed from saying "democracy works best when the people know what their government is doing" to "[d]emocracy works best when the people have all the information that the security of the nation will permit." Posting of Brian Montopoli to Public Eye, <http://www.cbsnews.com/blogs/2006/07/05/publiceye/entry1775358.shtml> (July 5, 2006, 10:18 EST).

¹⁷ *FOIA Hearing*, *supra* note 13.

¹⁸ 5 U.S.C. § 552(b)(1)–(9). For a more expansive discussion of Exemptions 2–9, see P. STEPHEN GIDIERE III, *THE FEDERAL INFORMATION MANUAL: HOW THE GOVERNMENT COLLECTS, MANAGES, AND DISCLOSES INFORMATION UNDER FOIA AND OTHER STATUTES* 219–95 (2006), and Thomas M. Susman & Harry A. Hammitt, *Business Uses of the Freedom of Information Act*, 14-3rd Corp. Prac. Series (BNA), at A-5 to -8 (2004).

¹⁹ See, e.g., OMB Watch, *supra* note 8 (tracking information removed from agency websites after September 11th); HOMEFRONT CONFIDENTIAL, *supra* note 8, at 60; Burr, *supra* note 4.

the interest of national defense or foreign policy and (b) are properly classified pursuant to such Executive Order.²⁰

For years, Exemption 1 has given the nation's Executive the power to decide what should and should not be released to the public.²¹ Even when FOIA was enacted, critics worried about the broad strokes of power FOIA granted to the Executive to make such decisions.²² Yet, even today, there is virtually no external control over the executive privilege to make classification decisions.²³

This comment will argue that reclassifying documents already released to the public does not serve national security interests and only fosters government secrecy, in direct conflict with the policy and goals of FOIA. The problem created by improper reclassification is the result of a combination of factors, including inadequate safeguards against reclassifications within the governing Executive Order, insufficient oversight of agency reclassification decisions, and consistent, yet misplaced, judicial deference to Exemption 1 decisions. In order to stop this constant undermining of FOIA's policy goals, strict restrictions must be placed on the executive branch's authority to reclassify publicly disclosed information. Part II of this comment will discuss the perpetual struggle to balance disclosure and national security, specifically the history of Exemption 1, the classification procedures under Executive Order 13,292, and the recent change in executive disclosure philosophies. Part III discusses the need to impose strict restrictions on the executive's authority to reclassify documents already released to the public. Specifically, it will discuss the inadequacy of Executive Order 13,292 in addressing this specific issue, the judiciary's concerns about the executive's authority to reclassify documents already in the public domain, and policy reasons

²⁰ 5 U.S.C. § 552(b)(1) (2006).

²¹ STEINBERG, *supra* note 6, at 17–18.

²² *Id.*

²³ *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the H. Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform*, 108th Cong. 23 (2004) [hereinafter *Too Many Secrets*] (statement of J. William Leonard, Director, Information Security Oversight Office, National Archives and Records Administration); *Edmonds v. U.S. Dep't of Justice*, 405 F. Supp. 2d 23, 27 (D.D.C. 2005) (asserting that courts must accord substantial weight to an agency's affidavit concerning classifications, especially in national security cases, in which the agency "possesses necessary expertise to assess the risk of disclosure," and judges "lack the expertise necessary to second-guess . . . agency opinions."). See also GIDIERE, *supra* note 18, at 77.

for imposing strict restrictions on reclassification procedures. Finally, Part IV will provide suggestions for restricting the executive authority when it makes reclassification decisions.

II. DISCLOSURE AND NATIONAL SECURITY: PERPETUALLY AT ODDS

A. HISTORY OF EXEMPTION 1 AND ITS GOVERNING EXECUTIVE ORDERS

Virtually every president since Lyndon B. Johnson has expressed fears that FOIA could lead to the disclosure of secrets harmful to the country. After an 11 year debate,²⁴ the bill that was eventually signed by Johnson in 1966 contained nine loosely-phrased exemptions.²⁵ Exemption 1 was premised on the so-called executive authority over national security matters, a concept articulated by the Supreme Court, derived from the constitutional provisions set forth in Article II, Section II.²⁶ Specifically, Exemption 1 provided that FOIA did not apply to information that was “specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy.”²⁷ Predictably, the loose language of these exemptions—particularly Exemption 1—was immediately seized upon by federal agencies as a reason for denying FOIA requests, even though the information did not necessarily fall within the claimed exemption.²⁸ Thus, while FOIA appeared to be revolutionary legislation, in practice, there was little change in actual agency disclosure.²⁹

²⁴ *Freedom of Information at 40*, *supra* note 14 (outlining the debate over FOIA, which began with hearings in 1955, led by FOIA’s primary backer California Congressman John E. Moss and ended with President Johnson signing the Act into law on July 4, 1966).

²⁵ STEINBERG, *supra* note 6, at 18; Freedom of Information Act, 90 Pub. L. No. 23, § 552(b)(1)–(9), 81 Stat. 54, 55 (1974) (current version at 5 U.S.C. § 552(b)(1)–(9) (2006)).

²⁶ *See* Dep’t of the Navy v. Egan, 484 U.S. 518, 527 (1988); U.S. CONST. art. II, § 2.

²⁷ 5 U.S.C. § 552(b)(1)–(9) (2006).

²⁸ STEINBERG, *supra* note 6, at 18.

²⁹ *Id.* at 17. “The passage of the 1966 Freedom of Information Act . . . unfortunately was without any real power because of certain provisions and exceptions that gave federal agencies a ready excuse for continuing to classify information.”

After the United States Supreme Court decision in *EPA v. Mink*,³⁰ which upheld the EPA's refusal to disclose its concededly unclassified reports on underground nuclear tests in Alaska, it became apparent that the 1966 Act needed to be revised.³¹ Despite immense pressure from federal agencies, Congress adopted several amendments to FOIA in 1974 over President Gerald Ford's veto.³² Among the many changes to FOIA was a complete revamp of Exemption 1. The new Exemption 1, which has remained intact since the 1974 Amendment, requires the Executive Order to set forth specific criteria for classifying information as secret; it also requires that documents withheld by an agency be "in fact properly classified pursuant to such Executive Order."³³

Although the 1974 Amendment to Exemption 1 requires more specific classification procedures and requires documents to be properly classified according to those procedures, courts give the executive branch substantial deference in its classification decisions.³⁴ This approach by the judiciary, combined with Congressional inaction, has left the executive branch largely unchecked in matters relating to classified information.³⁵

Historically, classification procedures under Executive Orders have changed as presidential philosophies on governmental transparency have changed.³⁶ President William J. Clinton's Executive Order 12,958 ("Clinton Order") was the most liberal of the Executive Orders pertaining to the Act; it promoted openness by creating an automatic declassification system and placing time limits on classification designations.³⁷ After the Clinton Order was issued,

³⁰ *EPA v. Mink*, 410 U.S. 73, 85–93 (1973) (holding that Exemptions 1 and 5 were sufficient grounds for the EPA's non-disclosure of the requested information).

³¹ STEINBERG, *supra* note 6, at 19.

³² *Id.*

³³ 5 U.S.C. § 552(b)(1) (2006).

³⁴ See *infra* Part III.B.

³⁵ GIDIERE, *supra* note 18, at 72.

³⁶ *Id.* at 226.

³⁷ Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995), as amended Exec. Order No. 13,142, 64 Fed. Reg. 66,089 (Nov. 19, 1999) [hereinafter Clinton Order]. See also GIDIERE, *supra* note 18, at 79.

the amount of information declassified by federal agencies drastically increased.³⁸ However, the amount of information declassified has dramatically declined after 2001.³⁹ Agency classification procedures are currently promulgated pursuant to Executive Order 13,292 ("Bush Order"), issued by President George W. Bush on March 25, 2003, as an amendment to the Clinton Order.⁴⁰

Overall, the number of decisions made by agencies to classify information has consistently and rapidly risen since the Bush Order took effect.⁴¹ To date, Exemption 1 is frequently cited by agencies that handle significant amounts of classified data, and since 1996, some agencies have increased the overall citation of this exemption as a basis for denying information.⁴² For example, in 2000, the Department of State cited Exemption 1 on three hundred and forty-nine occasions.⁴³ Compare this to 2005, when the Department of State cited Exemption 1 on five hundred and three occasions—a 44% increase over the five year period.⁴⁴

³⁸ INFO. SEC. OVERSIGHT OFFICE, 1995 REPORT TO THE PRESIDENT (Sept. 16, 1996), *available at* <http://www.archives.gov/isoo/reports/1995-annual-report.html> ("Under the systematic review program, agencies reviewed 25,108,258 pages of historically valuable records—89 percent more than in fiscal year 1994—and declassified 23,538,887 pages—109 percent more than in fiscal year 1994.").

³⁹ INFO. SEC. OVERSIGHT OFFICE, 2002 REPORT TO THE PRESIDENT 26 (June 30, 2003), *available at* <http://www.archives.gov/isoo/reports/2002-annual-report.pdf> ("During FY 2002, the executive branch declassified 44,365,711 pages of permanently valuable historical records. This figure represents a 56 percent decrease from that reported for FY 2001, and the largest decrease since Executive Order 12958 became effective on October 14, 1995.").

⁴⁰ *See* Exec. Order No. 13,292, 68 Fed. Reg. 15,315 § 1.1 (Mar. 25, 2003) [hereinafter Bush Order]. For a brief synopsis of the Bush Order's classification criteria, see *infra* note 46–50 and accompanying text.

⁴¹ GIDIERE, *supra* note 18, at 72–73.

⁴² *Id.* at 223. Agencies that process large amounts of classified information include the Department of Justice, Department of Homeland Security, and the Department of Defense. INFO. SEC. OVERSIGHT OFFICE, 2005 REPORT TO THE PRESIDENT 9 (May 26, 2006), *available at* <http://www.archives.gov/isoo/reports/2005-annual-report.pdf>.

⁴³ DEP'T OF STATE, FREEDOM OF INFORMATION ACT ANNUAL REPORT FISCAL YEAR 2000 7–8 (2001). Annual FOIA reports for all departments and agencies from 1998 to 2005 are available at http://www.usdoj.gov/o4foia/o4_6.html.

⁴⁴ DEP'T OF STATE, FREEDOM OF INFORMATION ACT ANNUAL REPORT FISCAL YEAR 2005 6–7 (2006).

B. CLASSIFICATION PROCEDURES UNDER THE BUSH ORDER

In the Opening Statement of Executive Order 13,292, President Bush acknowledged the important goals served by FOIA, but stressed the importance of national security:

Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security remains a priority.⁴⁵

Under the Bush Order, information can be classified only if it meets four requirements. First, the information must be classified by an original classification authority.⁴⁶ Original classification authorities include the president, vice president, agency heads and officials designated by the president, and government officials who have had such authority delegated to them.⁴⁷ Second, the information must be owned or produced by the U.S. government.⁴⁸ Third, the information must fall within at least one of eight categories:

- (a) military plans, weapons systems, or operations;
- (b) foreign government information;
- (c) intelligence activities . . . , sources or methods, or cryptology;
- (d) foreign relations or foreign activities of the United States, including confidential sources;

⁴⁵ Bush Order, *supra* note 40.

⁴⁶ *Id.* § 1.1(a)(1).

⁴⁷ *Id.* § 1.3.

⁴⁸ *Id.* § 1.1(a)(2).

(e) scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism;

(f) United States Government programs for safeguarding nuclear materials or facilities;

(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to the national security, which includes defense against transnational terrorism; or

(h) weapons of mass destruction.⁴⁹

And fourth, the original authorizer must determine that the unauthorized disclosure of the information could reasonably be expected to result in damage to the national security, which includes defense against transnational terrorism, and the classification authority is able to identify or describe the potential damage.⁵⁰

Although these general classification standards are largely similar to those found in the Clinton Order, some amendments allow more information to be classified.⁵¹ First, the Bush Order broadens the definition of national security by including “defense against transnational terrorism.”⁵² The Order also adds a new class of information that can be classified with the addition of “weapons of mass destruction” to Section 1.4 of the Order.⁵³ In addition, the Bush Order creates a presumption that the unauthorized disclosure of foreign government information⁵⁴ will cause damage to the national

⁴⁹ *Id.* § 1.4.

⁵⁰ *Id.* § 1.1(a)(4).

⁵¹ See GIDIERE, *supra* note 18, at 79–82.

⁵² Compare Clinton Order, *supra* note 37, §§ 1.2(a)(4), 1.5(e), 1.5(g), with Bush Order, *supra* note 40, §§ 1.1(a)(4), 1.4(e), 1.4(g). Terrorism is considered transnational when “an incident in one country involves perpetrators, victims, institutions, governments, or citizens of another country.” WALTER ENDERS & TODD SANDLER, *THE POLITICAL ECONOMY OF TERRORISM* 7 (2006).

⁵³ Compare Clinton Order, *supra* note 37, § 1.5 with Bush Order, *supra* note 40, § 1.4.

⁵⁴ “Foreign Government Information” is defined as:

security,⁵⁵ and removes Section 1.2(b) of the Clinton Order, which prohibited the classification of information when there was “significant doubt” as to whether the information needed to be classified.⁵⁶

In addition to these initial classification procedures, the Bush Order provided for the automatic declassification of documents that were more than twenty-five years old and had permanent historical value on December 31, 2006, regardless of whether the information had been reviewed.⁵⁷ This December 31, 2006 deadline was a three-and-a-half year extension of the deadline originally set in the Clinton Order.⁵⁸ Despite this deadline, there are numerous exemptions that an agency can claim to either prevent automatic declassification or extend the deadline for compliance.⁵⁹ As of November 2004, automatic declassification led to the declassification of more than 982 million pages.⁶⁰ In a July 2007 report to the House Committee on Intelligence, J. William Leonard, Director of the Information Security

(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) information produced by the United States Government pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence; or

(3) information received and treated as “foreign government information” under the terms of a predecessor order.

Bush Order, *supra* note 40, § 6.1(r).

⁵⁵ Bush Order, *supra* note 40, § 1.1(c).

⁵⁶ Compare Clinton Order, *supra* note 37, § 1.2(b), with Bush Order, *supra* note 40.

⁵⁷ Bush Order, *supra* note 40, § 3.3(a).

⁵⁸ Clinton Order, *supra* note 37, § 3.4 (setting the date for automatic declassification to be “within five years from the date of this order,” which was later amended by Clinton to read “within six and one half years from the date of this order”). See also GIDIERE, *supra* note 18, at 83.

⁵⁹ See Bush Order, *supra* note 40, § 3.3; GIDIERE, *supra* note 18, at 82–87.

⁶⁰ INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT: AN ASSESSMENT OF DECLASSIFICATION IN THE EXECUTIVE BRANCH (Nov. 30, 2004), available at <http://www.archives.gov/isoo/reports/2004-declassification-report.html>.

Oversight Office, reported that approximately 257 million documents have been declassified as a result of pursuant automatic declassification procedures found in the two previous executive orders.⁶¹

Finally, the Bush Order outlined prohibitions and limitations on classification. Section 1.7 prohibits classification that attempts to “(1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of national security.”⁶² This section also prohibits the reclassification of information that has already been declassified and released to the public under proper authority unless: (1) action to reclassify is taken by the personal authority of the agency head or deputy agency head, who determines in writing that the reclassification of the information is necessary in the interest of national security; (2) the information may reasonably be recovered; and (3) the reclassification action is promptly reported to the Director of the Information Security Oversight Office.⁶³ In the Clinton Order, there was no exception that permitted the reclassification of information that had already been declassified and released to the public.⁶⁴

While the Bush Order does not completely reverse the movement toward further disclosure initiated by the Clinton Order, the changes in it have slowed its progress, by delaying the automatic

⁶¹ Formal Statement of J. William Leonard, Director, Information Security Oversight Office, Before the House Permanent Select Comm. on Intelligence, Subcomm. on Intelligence Community Management 10 (July 12, 2007), *available at* <http://intelligence.house.gov/Media/PDFS/Leonardo71207.pdf>. Leonard also reported: “During FY 2006, the Executive branch declassified 37,647,993 pages of permanently valuable historical records, which is a 27 percent increase over what was reported for FY 2005.” *Id.* Despite previous extensions of the automatic declassification deadline, the December 31, 2006 deadline passed without further extension. It is expected that, because of the extraordinary number of documents that are subject to automatic declassification, it will take months for the documents to become available to the public and years for scholars to sift through them. Scott Shane, *Secrets to Be Declassified Under New Rule at Age 25*, N.Y. TIMES, Dec. 21, 2006, at A36.

⁶² Bush Order, *supra* note 40, § 1.7(a).

⁶³ *Id.* at § 1.7(c).

⁶⁴ Clinton Order, *supra* note 37, § 1.7(c).

declassification of documents and creating more bases for the classification of documents.⁶⁵

C. A CHANGE IN APPROACHES

While the Clinton Order fostered openness and public access to documents, the Bush Order errs on the side of caution, favoring a presumption of classification and non-disclosure. This change was not only reflected in the differences between the respective Executive Orders, but can also be found in memoranda by government officials regarding FOIA and classification procedures.

It is important to note that the structure of FOIA does not require an agency to claim exemptions.⁶⁶ Rather, FOIA grants agencies the discretion to decide whether or not to invoke a FOIA exemption.⁶⁷ Because of this discretion, disclosure policies can differ from agency to agency and even within constituent sections of a single agency. In addition, political events, such as a presidential election or a terrorist attack, can have a substantial effect on an agency's discretion when creating its disclosure policy.⁶⁸ Since 1977, the Attorney General has attempted to influence how agencies use this discretion by issuing a memorandum that establishes standards for agencies to follow when making disclosure decisions.⁶⁹ The Attorney General's power over agency discretion flows from the Department of Justice's almost exclusive authority to represent the United States, its agencies, and its officers in FOIA litigation.⁷⁰ As a result, the Department of Justice is ultimately charged with defending any agency decision to withhold information.⁷¹

Since 1993, three executive branch memoranda have guided agency disclosure decisions: the Reno Memorandum, issued pursuant to the Clinton Order; the Ashcroft Memorandum and the Card

⁶⁵ GIDIERE, *supra* note 18, at 79.

⁶⁶ See generally 5 U.S.C. § 552 (2006).

⁶⁷ GIDIERE, *supra* note 18, at 291.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 291–92.

⁷¹ *Id.* at 292.

Memorandum, both issued pursuant to the Bush Order. Although each memorandum offers different guidance to agencies, they all illustrate with startling clarity that the executive branch is too influential over the agency decision-making process. Because of this influence and the unlikelihood that there will be a shift in the executive branch's FOIA policies in the near future, any changes that prevent the reclassification of information already available in the public domain must be made within FOIA legislation itself.

1. THE RENO MEMORANDUM

In October 1993, President Clinton and Attorney General Janet Reno took proactive steps to substantially increase the amount of government information made available to the public.⁷² This marked a dramatic change in the executive branch's usual approach to FOIA, especially when compared to Clinton's predecessors, Ronald Reagan and George H. W. Bush. In a memorandum to all departments and agencies, Clinton recognized FOIA as a vital part of democracy and expressed his intention to enhance the overall effectiveness of the Act during his presidency.⁷³ Clinton also seemed to express frustration at previous agency practice in the handling of FOIA requests: "The use of the Act by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation."⁷⁴ In an effort to rid the system of some of these bureaucratic hurdles, Clinton called upon agencies to "take a fresh look at their administration of the Act, to reduce backlogs of Freedom of Information Act requests, and to conform agency practice to the . . . guidance issued by the Attorney General."⁷⁵

One of the more dramatic changes made in the Reno Memorandum was the rescission of the Department of Justice's 1981

⁷² Press Release, Dep't of Justice, Government Adopts New Standard for Openness (October 4, 1993), available at <http://www.fas.org/sgp/clinton/reno.html>.

⁷³ Memorandum from President William J. Clinton, President, to Heads of Departments and Agencies, The Freedom of Information Act (Oct. 4, 1993), http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page2.htm [hereinafter Clinton Memorandum] ("The Act is a vital part of the participatory system of government. I am committed to enhancing its effectiveness in my Administration.").

⁷⁴ *Id.*

⁷⁵ *Id.*

guidelines for the defense of agency actions in FOIA litigation.⁷⁶ In place of the 1981 guidelines, the Reno Memorandum stated: "The Department will no longer defend an agency's withholding of information merely because there is a 'substantial legal basis' for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption for disclosure."⁷⁷ Thus:

It shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.⁷⁸

The Reno Memorandum asserted that this change in policy would accomplish the goal of maximum responsible disclosure of government information, while preserving essential confidentiality.⁷⁹ At the close of the memorandum, Attorney General Reno reiterated that these new procedures would be implemented as a means of "[making] government throughout the executive branch more open, more responsive, and more accountable."⁸⁰

Reno's inclusion of the "reasonably foreseeable" standard marked the first time a presidential administration adopted such a disclosure-friendly standard with regard to FOIA requests. One month after September 11, however, Attorney General John Ashcroft retreated from this policy and restored the earlier presumption in favor of withholding information that had been abandoned following the Reno Memorandum.

⁷⁶ Reno Memorandum, *supra* note 7. Please note that while the author was writing this comment, the direct link to the Reno Memorandum was removed from the Department of Justice's Electronic Reading Room.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

2. THE ASHCROFT AND CARD MEMORANDA

In October 2001, Attorney General Ashcroft issued a memorandum to all federal departments and agencies superseding the Reno Memorandum.⁸¹ After citing the general policy behind FOIA, the Ashcroft Memorandum acknowledged an equal commitment to protecting “other fundamental values that are held by our society.”⁸² Among these “other fundamental values,” Ashcroft cited “the safeguarding [of] our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information, and, not least, preserving personal privacy.”⁸³ After strong encouragement for every agency to fully and deliberately consider the implications of information disclosure, Ashcroft expressly repudiates Reno’s promise to only defend those cases where the agency “reasonably foresees” that disclosure would be harmful.⁸⁴ Instead, the Ashcroft Memorandum promises agencies:

When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.⁸⁵

This Ashcroft Memorandum remains in effect, and no efforts have been made to change the disclosure policies set forth by the Ashcroft Memorandum.⁸⁶

⁸¹ It is interesting to note that while the Ashcroft Memorandum specifically repudiates the Reno Memorandum, the Clinton Memorandum, which was issued simultaneously with the Reno Memorandum, presumably remains in effect. GIDIERE, *supra* note 18, at 29.

⁸² Ashcroft Memorandum, *supra* note 7.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Attorney General Alberto Gonzales asserted in his Senate confirmation hearing that he would “undertake an examination of the department’s policies and practices concerning FOIA disclosures,” yet it is unclear whether such an examination was ever undertaken during Gonzales’s tenure. *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 354 (2005) (responses of Alberto R. Gonzales, Nominee to be Att’y

In March 2002, Chief of White House Staff Andrew Card, Jr. issued his own memorandum. The Card Memorandum was specifically focused on FOIA's Exemption 1, which sets standards for an agency to follow when evaluating the decision to disclose documents pertaining to weapons of mass destruction and other homeland security matters.⁸⁷

Specifically, the Card Memorandum stated: "Government information, regardless of its age, that could reasonably be expected to assist in the development or use of weapons of mass destruction, including information about the current locations of stockpiles of nuclear materials that could be exploited for use in such weapons, should not be disclosed inappropriately."⁸⁸ Card then directed agency officials to the attached guidance procedures issued by the Information Security Oversight Office and the Office of Information and Privacy at the Department of Justice. The guidance procedures went on to lay out ways in which loopholes in FOIA should be exploited to prevent automatic declassification.⁸⁹ These loopholes

Gen., to the written questions of Sen. Patrick Leahy). Prior to the Senate confirmation hearings of Attorney General Michael B. Mukasey, Senator Patrick Leahy sent Mukasey a letter with the following inquiry:

Policies enacted by this [Bush] Administration have encouraged Department of Justice officers to withhold information under the Freedom of Information Act (FOIA), the bedrock statute that opens our government to its citizens. Will you commit to review and consider overturning these policies . . . so that the presumption of openness which is at the heart of FOIA is restored for the American people?

Letter from Patrick J. Leahy, United States Senator, to Michael B. Mukasey, Nominee for Attorney General (Oct. 2, 2007), at 3, *available at* <http://leahy.senate.gov/press/200710/10-207%20PJJL%20questions%20to%20Mukasey.pdf>. Mukasey failed to answer the inquiry in his response to Senator Leahy's letter. *See Responses of Michael B. Mukasey, Nominee for Attorney General, to Patrick J. Leahy, United States Senator (Oct. 9, 2007), available at* http://leahy.senate.gov/press/200710/Mukasey_questionnaire.pdf.

⁸⁷ Card Memorandum, *supra* note 7.

⁸⁸ *Id.*

⁸⁹ *Id.* Specifically, the Memorandum addressed two loopholes. To take advantage of the first loophole, the Memorandum directs agencies to classify weapons information that is more than twenty-five years old even if it was not previously considered classified. For the second loophole, the Memorandum advises agencies to reclassify sensitive information concerning weapons of mass destruction even if the information was declassified if it had never been disclosed under proper authority. *See also* Memorandum from Laura L. S. Kimberly, Acting Director of Info. Sec. Oversight Office, and Richard L. Huff and Daniel J.

existed in the automatic declassification procedures, the procedures for disclosure of sensitive but unclassified information, and disclosure procedures of previously unclassified or declassified information, all found within the Bush Order.⁹⁰

While the post-September 11th FOIA memoranda seem to create an institutional preference for the withholding of information that would have likely been disclosed under the Reno Memorandum's "reasonably foreseeable" standard, it is unclear to what extent these memoranda actually affect agency decisions.⁹¹ After the Ashcroft Memorandum was issued, a 2003 study by the General Accountability Office ("GAO") found that 48% of FOIA officers did not notice changes in their agency's responses to FOIA requests compared to previous years. Specifically, the officers noticed no change in the likelihood of their agency making discretionary disclosures. However, about one-third of FOIA officers did note a decreased likelihood of these discretionary disclosures compared to previous years, with 75% of that group attributing this new policy as a top factor influencing the change.⁹² Thus, there is some basis for believing that the Ashcroft and Card memoranda have caused a policy shift away from discretionary disclosures.

3. A NEW KIND OF WAR

In December 2000, Attorney General Alberto Gonzales, who was then counsel to the President, wrote an article in the *Washington Post* in which he said: "At times, certain documents may still be so sensitive that they must remain confidential. In some cases, release of documents could jeopardize our national security, and while the

Metcalf, Co-Directors of the Office of Info. and Privacy, Dep't of Justice, to Departments and Agencies, Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Records Related to Homeland Security (Mar. 21, 2002), <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm> [hereinafter DOJ Memorandum]; HOMEFRONT CONFIDENTIAL, *supra* note 8, at 59; DADGE, *supra* note 6, at 149.

⁹⁰ See Card Memorandum, *supra* note 7; DOJ Memorandum, *supra* note 89.

⁹¹ For instance, information that "arguably" falls within Exemption 1 is much less likely to be disclosed under the Ashcroft and Card memoranda. U.S. GEN. ACCOUNTING OFFICE, FREEDOM OF INFORMATION ACT: AGENCY VIEWS ON CHANGES RESULTING FROM NEW ADMINISTRATION POLICY 2 (2003), *available at* <http://www.gao.gov/new.items/do3981.pdf>.

⁹² *Id.*

pursuit of history is invaluable to our society, it should not endanger American lives.”⁹³ After September 11, 2001, it became clear that America was engaged in a new kind of war, in which the enemy was unknown, did not pledge allegiance to a particular country and operated in our own backyard. Not only was the enemy sophisticated and lethal, but America had drastically underestimated him.⁹⁴

A few months after September 11, the *Sun-Sentinel* published an editorial criticizing the government for “helping U.S. enemies” by “freely sharing formerly classified information about how to turn dangerous germs into lethal weapons.”⁹⁵ The editorial said, “It’s too late to reclassify the information. Once the genie is out of the bottle, it can’t be put back. But it doesn’t have to be so easy to obtain, either.”⁹⁶ This emphasizes the crux of the debate: How much of the public’s right to know is America willing to sacrifice for national security? Some, like the writer of the *Sun-Sentinel* editorial, believe national security must be the government’s paramount concern. In this new kind of war, the possibility that publicly available information could be used against America in a future terrorist attack is a risk that is too great to take.

National security is of the utmost importance; this comment does not advocate the disclosure of information that would be damaging to national security. However, in the post-September 11th era, there have been marked examples of agencies withholding information that does not appear to pose any such threat to national security.⁹⁷ For instance, the disclosure of cold war missile numbers that have been available to the public for more than thirty years cannot rationally be

⁹³ Alberto Gonzales, Editorial, *Freedom, Openness and Presidential Papers*, WASH. POST, Dec. 20, 2001, at A43.

⁹⁴ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT xvi (2004) [hereinafter 9/11 COMMISSION] (“We learned about an enemy who is sophisticated, patient, disciplined, and lethal. The enemy rallies broad support in the Arab and Muslim world by demanding redress of political grievances, but its hostility toward us and our values is limitless We learned that institutions charged with protecting our borders, civil aviation, and national security did not understand how grave this threat could be, and did not adjust their policies, plans, and practices to deter or defeat it.”), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

⁹⁵ Editorial, *U.S. Must Stop Helping Enemies*, SUN-SENTINEL, Jan. 16, 2002, at A16.

⁹⁶ *Id.*

⁹⁷ See *infra* notes 107–08.

considered a threat to national security, especially when the numbers are easily accessible on the Internet.⁹⁸

One of the conceptual underpinnings of FOIA is the need to encourage an open and honest government.⁹⁹ When the Executive impedes access to documents the public is entitled to view, especially documents that have existed within the public domain for long periods of time, it is difficult to see how national security is being served. The information cannot be construed “secret” any longer because the information is already out there and has been for a long time.¹⁰⁰ When information is erroneously released to the public, an agency should be able to retrieve that information up to a certain point. However, there needs to be a limit on this power of retrieval. Whether the reclassifications are the result of sinister or cautious motives is irrelevant. Strict restrictions are still needed to ensure that agencies are making the proper decisions when deciding whether to disclose requested information. Leaving agencies virtually unrestricted in their reclassification decision makes the temptation to restrict data for improper purposes too great.¹⁰¹

III. IMPOSING STRICT RESTRICTIONS ON EXECUTIVE AUTHORITY TO RECLASSIFY DOCUMENTS ALREADY RELEASED IN THE PUBLIC DOMAIN

While agencies have broad discretion in their disclosure decisions, guided of course by the Attorney General’s standards, one area where

⁹⁸ See Burr, *supra* note 4 (comparing cold war documents released in the 1970s with their identical counterparts released this year to reflect the change in agency disclosures), but see *U.S. Must Stop Helping Enemies*, *supra* note 95; Broad, *supra* note 9 (quoting Homeland Security Director Tom Ridge, who said that critics of the removal of information from the public domain were overreacting and that “we have to remember what we’re up against.”).

⁹⁹ David O. Stewart, *On 40th Birthday, Freedom of Information Act Faces Midlife Crisis*, BALT. SUN, July 4, 2006, at A9.

¹⁰⁰ *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 836 (D.C. Cir. 2001).

¹⁰¹ After the Archive issued its initial report about the Cold War missile blackout, the Department of Defense released, as a result of an administrative appeal, unredacted versions of documents that had initially been subject to the blackout. “Reclassification of previously public data crossed the line into absurdity, and now our protests have established a whole new feature of the secrecy system: de-re-classification!” said Archive director Thomas Blanton. Administrative appeals on other documents are still pending. Burr, *supra* note 4.

agencies should not have such discretion is in the reclassification of information already released in the public domain. Leaving such decisions to agencies with little guidance will often result in erroneous withholdings, with little or no benefit to national security, while creating an immense burden on the public's right to know.

Although the Bush Order sets out reclassification procedures, the substantial increase in post-9/11 reclassifications of information already in the public domain, virtually all of which have occurred without agency observance of the Bush Order procedures, evinces the reality that the current system is flawed.¹⁰² Upon review, the judiciary has refused to allow the withholding of information already in the public domain, formulating its own standard for restricting these reclassifications.¹⁰³ However, in practice, individuals making FOIA requests have rarely been able to satisfy the too stringent standard established by the judiciary.

The inadequacy of current procedures and the dramatic effects on the public as a result of these erroneous reclassifications signify that it is time to place strict restrictions on the executive's authority to reclassify documents already released in the public domain.¹⁰⁴ As the Ashcroft and Card memoranda show, the executive branch too easily influences agency discretion.¹⁰⁵ Thus, these changes must be made within FOIA legislation itself, not in the Executive Order governing agency use of Exemption 1.

A. THE BUSH EXECUTIVE ORDER CONTAINS INADEQUATE RECLASSIFICATION REQUIREMENTS

The removal of information from the public domain has been rampant since September 11th. Claiming national security as a basis for their actions, numerous agencies began removing information from their websites shortly after the terrorist attacks on the World

¹⁰² INFO. SEC. OVERSIGHT OFFICE, AUDIT OF THE WITHDRAWAL OF RECORDS FROM PUBLIC ACCESS AT THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION FOR CLASSIFICATION PURPOSES 5 (2006), *available at* <http://www.archives.gov/isoo/reports/2006-audit-report.pdf> [hereinafter ISOO AUDIT].

¹⁰³ *See infra* Part III.B.

¹⁰⁴ For a discussion on the impacts of erroneous reclassification on the public, see *infra* Part III.C.2.

¹⁰⁵ *See supra* note 92 and accompanying text.

Trade Center.¹⁰⁶ According to one report, federal agencies have removed more than 25,000 previously disclosed records from the National Archives and reclassified them as “secret.”¹⁰⁷ Some of these documents included a 1951 assessment of agrarian reform in Guatemala and a 1948 memo about leaflet droppings in Communist countries.¹⁰⁸ In January 2002, the Bush Administration began withdrawing more than 6,600 technical documents, mainly concerning the production of germ and chemical weapons, from the public sphere, and there have been other numerous reports that agencies no longer disclose certain types of information.¹⁰⁹ While some of these protective measures were legitimate, there have been claims by journalists, private organizations, businesses, and other concerned individuals that some of these documents should not have been reclassified and removed from the public domain.¹¹⁰

Prior to the Bush Order, under no circumstances could an agency reclassify documents that had been declassified and released to the public.¹¹¹ But, the Bush Order removed this blanket prohibition, allowing for reclassification if the particular information could be “reasonably recovered” and if the agency observed certain procedures prior to reclassifying the information.¹¹²

Although the Bush Order forbids reclassification where the documents cannot be “reasonably recovered,” this restriction is insufficient. Specifically, the restriction leaves the classifying authority with too much discretion to determine what can and cannot “reasonably” be recovered. Despite assertions by government officials that these are adequate limitations on reclassification, the subjectivity

¹⁰⁶ OMB Watch, *supra* note 8; Mart, *supra* note 9, at 15 (citing examples where the Environmental Protection Agency and Federal Energy Regulatory Commission improperly used terrorism as an excuse to remove information regarding risk management plans, dams, pipelines, and other energy facilities from the public’s reach). The EPA later conceded the disclosure of this information posed no unique, increased threat to national security. Mart, *supra* note 9, at 15.

¹⁰⁷ Stewart, *supra* note 99.

¹⁰⁸ *Id.*

¹⁰⁹ Broad, *supra* note 9. *See generally* Mart, *supra* note 9.

¹¹⁰ Broad, *supra* note 9; Mart, *supra* note 9, at 7–8; Lee, *supra* note 3; Pitts, *supra* note 10.

¹¹¹ Clinton Order, *supra* note 37.

¹¹² Bush Order, *supra* note 40, § 1.7(c). *See supra* text accompanying note 64.

leads to the ultimate failure of the overall reclassification scheme set forth in Section 1.7(b).¹¹³

The scheme's ultimate failure is demonstrated in a 2006 Information Security Oversight Office ("ISOO") audit of the withdrawal of records from public access for classification purposes.¹¹⁴ The audit surveyed 1,353 documents that had been withdrawn from public access, and found that of these documents, 46% were not entitled to continued classification—the removal was erroneous.¹¹⁵ The ISOO indicated that, in many cases, even when the withdrawn record met the standard of continued classification, the ISOO believed that "insufficient judgment was applied to the decision to withdraw the record from public access."¹¹⁶ This was especially true where withdrawal was virtually ineffective because the record had been published elsewhere.¹¹⁷ The ISOO also noted in its report that since the reclassification exception was adopted in the Bush Order, not one agency had notified the ISOO of any reclassification action (pursuant to the third requirement for reclassification).¹¹⁸ Such findings make one question whether an agency ever actually considers these reclassification requirements when it is faced with a FOIA request.

The answer to this question becomes even clearer upon analysis of the Archive's Cold War missile report. When making disclosure decisions, an agency is required to indicate the reason for determining that information cannot be disclosed. For instance, in the case of the redacted Cold War missile numbers, the agency often cited to Section

¹¹³ *Too Many Secrets*, *supra* note 23.

¹¹⁴ ISOO AUDIT, *supra* note 102. The ISOO is responsible to the president for policy and oversight of the Government-wide security classification system and the National Industrial Security Program. See National Archives, Information Security Oversight Office Home Page, Information Security Oversight Office, <http://www.archives.gov/isoo/> (last visited Mar. 28, 2008).

¹¹⁵ ISOO AUDIT, *supra* note 102, at 1. For the audit, ISOO used the standards for classification set forth in the Bush Order, as well as agency declassification guides, to assign each sampled record to one of three categories: "appropriate," "questionable," or "inappropriate." A record was considered "inappropriate" if "it was clear that none of the information in the record met the standards for continued classification or if the record was reclassified without following proper procedures." *Id.* at 14–15.

¹¹⁶ *Id.* at 2.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 5.

3.3 of the Bush Order as its basis for withholding information.¹¹⁹ However, Section 3.3 governs the automatic declassification of records more than twenty-five years old that have *not already been declassified*. The documents and the information redacted from the Cold War missile documents were declassified years ago.¹²⁰ In addition, many of the exemptions were claimed under Section 3.3(b)(5), which allows an agency head to exempt from automatic declassification information that could be expected to reveal actual U.S. military war plans that *remain in effect*.¹²¹ One example of this claimed exemption is in the 2006 release of a memorandum from former Secretary of Defense Robert S. McNamara to President John F. Kennedy, in which the disclosing agency redacted numbers of strategic missiles contained in U.S. nuclear arsenals between 1965 and 1967.¹²² It is difficult to see how these numbers could reasonably be expected to reveal actual U.S. military war plans that remain in effect, especially when such numbers are outdated and continue to be easily accessible on the Internet.¹²³

It is impossible to know for sure whether erroneous reclassifications such as these are the result of agencies failing to adhere to the reclassification procedures set forth in Section 1.7(b) of the Bush Order or simply the result of agencies failing to consider the procedures at all. It is difficult to see how agencies could possibly be considering these requirements when there are numerous instances of information being erroneously reclassified, but not one instance of an agency going through the Section 1.7(b) reclassification procedures.¹²⁴ Regardless of whether agencies actually consider the reclassification

¹¹⁹ See generally Burr, *supra* note 4 (showing numerous examples of the agency citing Section 3.3 of the Bush Executive Order as its basis for redacting information that was previously available).

¹²⁰ *Id.*

¹²¹ Bush Order, *supra* note 40, § 3.3(b)(5).

¹²² See, e.g., Memorandum from Robert S. McNamara, Secretary of Defense, to the President, Recommended FY 1966–1970 Programs for Strategic Offensive Forces, Continental Air and Missile Defense Forces, and Civil Defense 7 (Dec. 3, 1964), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB197/nd%201b.pdf> (showing redactions and corresponding exemptions).

¹²³ See, e.g., *id.* at 5 (showing numbers of nuclear weapons in United States arsenal between 1965 and 1967).

¹²⁴ See *supra* notes 114–16.

procedure when they are presented with a FOIA request, the fact remains that there are still too many instances of erroneous reclassifications under the guidance of the Bush Order.

B. CASE LAW APPROACH TO CLAIMS OF RECLASSIFICATION

When reviewing an agency's decision to deny a FOIA request, courts are required to conduct review *de novo*.¹²⁵ *De novo* review requires that the court conduct non-deferential review of agency action, and that the agency bear the burden of justifying its decision to deny the request.¹²⁶ Thus, the reviewing court makes the ultimate determination whether information should be withheld under any of the nine exemptions.¹²⁷ However, when courts conduct review of non-disclosure based on Exemption 1, courts have consistently deferred to the agency's determination.¹²⁸ Such deference to agency decisions on national security has even been endorsed by Congress.¹²⁹

Despite the substantial deference afforded to agencies on national security matters,¹³⁰ even courts have shown a willingness to accept the argument that publicly known information cannot be withheld under

¹²⁵ 5 U.S.C. § 552(a)(4)(B) (2006).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003). *See, e.g.,* *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (stating that "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches"); *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the executive in military and national security affairs."); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (holding that courts are to "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record" because "the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of a particular classified record").

¹²⁹ S. Rep. No. 93-1200, at 8-9, 12 (1974) (Conf. Rep.).

¹³⁰ For a more general discussion of *de novo* review and judicial deference, see Nathan Slegers, Comment, *De Novo Review Under the Freedom of Information Act: The Case Against Judicial Deference to Agency Decisions to Withhold Information*, 43 SAN DIEGO L. REV. 209 (2006).

Exemption 1.¹³¹ For information to be “officially acknowledged” such that the agency has waived its right to invoke Exemption 1, courts require that information sought must: (1) be as “specific” as the information previously disclosed; (2) “match” the information previously disclosed; and (3) have been made public through an “official and documented” disclosure.¹³² The burden of proof rests on the individual making FOIA request. However, the courts that have applied this test recognize that the individual initiating the request faces “substantial practical difficulties in using [FOIA] to force the government to release further information” when attempting to establish the elements of the claim.¹³³

First, it is difficult, if not impossible, to show with specificity that the documents are the same. If such a precise showing could be made, it is unlikely the requester would have placed the request in the first place.¹³⁴ Second, courts will often not allow the disclosure of information that is subject to widespread media and public speculation on grounds that official acknowledgement by an authoritative source may still cause damage to national security.¹³⁵ For example, in *Afshar v. Department of State*, information published in books by former CIA agents and officials, all of which had been subject to prepublication review by the CIA, was not enough to garner the release of the documents because the information in the books was not *specifically* revealed by the CIA.¹³⁶ Third, courts are sensitive to the difficulty of distinguishing with particularity, without revealing information that ought to be kept secret, releasable documents from

¹³¹ *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983); *Founding Church of Scientology of Wash., D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 831–32 (D.C. Cir. 1979); *Lamont v. Dep't of Justice*, 475 F. Supp. 761, 772 (S.D.N.Y. 1979); *Military Audit Project v. Casey*, 656 F.2d 724, 741–45 (D.C. Cir. 1981); *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (“Under the public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.”).

¹³² *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990); *Davis v. Dep't of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992); *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001).

¹³³ *Afshar*, 702 F.2d at 1130.

¹³⁴ See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 764 (1989); *Niagara Mohawk Power Corp. v. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999).

¹³⁵ *Afshar*, 702 F.2d at 1130–31.

¹³⁶ *Id.* at 1133.

those that must be withheld.¹³⁷ Thus, if the court sees no bad faith or sloppiness in the declassification or review process, "a court will feel with special urgency the need to 'accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'"¹³⁸

While the application of the Public Domain Doctrine usually results in a court upholding an agency's non-disclosure, there have been a few instances where disclosure was compelled or the court implied that different facts might compel disclosure. In *Cottone v. Reno*, the United States Court of Appeals for the D.C. Circuit held that, until destroyed or placed under seal, tapes played in open court and admitted into evidence, the court reporter's transcript, the parties' briefs, and the judge's orders and opinions remain part of the public domain.¹³⁹ However, the court stipulated that Cottone was only entitled to those audio tapes played in court, and that any constitutionally compelled disclosure to a single party is not considered to be in the public domain.¹⁴⁰ In addition, the D.C. Circuit in *Niagara Mohawk Power Corp. v. Department of Energy* held that initiators of FOIA requests may be able to satisfy their burden of production by pointing to a regulation that requires disclosure of the specific information sought.¹⁴¹

Despite these rare cases of a successful challenge to nondisclosure, the often insurmountable hurdles created by the Public Domain Doctrine almost always result in an agency victory. Courts are extremely hesitant to override agency determinations on national security matters. Although the courts are willing to recognize that the exemption cannot be claimed when the information is already in the public domain, they have failed to formulate an adequate test.

¹³⁷ *Id.* at 1131.

¹³⁸ *Id.* (citing S. Rep. No. 93-1200, at 12 (1974) (Conf. Rep.)).

¹³⁹ *Cottone v. Reno*, 193 F.3d 550, 554-55 (D.C. Cir. 1999). *But see* *Doolittle v. Dep't of Justice*, 142 F. Supp. 2d 281, 285 (N.D.N.Y. 2001).

¹⁴⁰ *Cottone*, 193 F.3d at 556.

¹⁴¹ *Niagara Mohawk Power Corp. v. Dep't of Energy*, 169 F.3d 16, 19-20 (D.C. Cir. 1999) (allowing a regulation requiring publication of information to meet the burden of production but holding that the burden was not fulfilled because the information required by the regulatory form was projected data while the document requested contained actual data).

C. POLICY REASONS FOR IMPOSING STRICT STANDARDS

While it is clear that agencies are frequently removing documents from the public sphere, they encounter little or no interference from Congress or the courts. Nevertheless, the removal of information from the public domain has consequences that reach far beyond the initial FOIA requester. Allowing these agency decisions to go largely unchecked not only undermines the spirit of FOIA, but also fosters the public's distrust of government while securing little or no aid to national security.

1. LOCKING THE BARN AFTER THE HORSE HAS ESCAPED

In a Baltimore Sun editorial, columnist Leonard Pitts Jr. stated that the Cold War missile blackout was "a classic case of locking the barn after the horse has escaped—and died of old age."¹⁴² Once an agency discloses information to the National Archives, FOIA requesters, libraries, or the public through the Internet, the ability for that agency to "reasonably" reclaim that information is virtually impossible, especially because of replication on the Internet.¹⁴³ Once something is released, it can and usually is easily replicated on the Internet. For instance, in the case of the Cold War missile blackout, the Archive provides PDF versions of all original documents where the information was not blacked out.¹⁴⁴ To view these documents, one must only download the free viewing software and click on the hyperlink.

Even courts recognize the absurdity of trying to reclaim information in the public domain. As one court points out: "If the information has already been disclosed and is so widely disseminated that it cannot be made secret again, its subsequent disclosure will cause no further damage to the national security."¹⁴⁵ Furthermore, the suppression of such information would "frustrate the pressing policies of the Act without even arguably advancing countervailing considerations."¹⁴⁶ When courts are faced with deciding whether to

¹⁴² Pitts, *supra* note 10.

¹⁴³ See generally Mart, *supra* note 9.

¹⁴⁴ See *supra* notes 119–23 and accompanying text. See generally Burr, *supra* note 4.

¹⁴⁵ Wash. Post v. Dep't of Defense, 766 F. Supp. 1, 9 (D.D.C. 1991).

¹⁴⁶ Founding Church of Scientology of Wash., D.C., Inc. v. Nat'l Sec. Agency, 610 F.2d 824, 831–32 (D.C. Cir. 1979).

override agency determinations and release information, however, they are hesitant because they “lack the authority to limit the dissemination of documents once they are released under FOIA, or to choose selectively among recipients.”¹⁴⁷ Because agencies cannot “reasonably” reclaim information already in the public domain, strict restrictions need to be placed on agencies’ attempts to do so.

2. RECLASSIFICATION DEPRIVES SOCIETY OF BENEFICIAL USES OF RECLASSIFIED INFORMATION.

While it may seem that the reclassification of documents, such as those disclosing Cold War missile numbers, may have little impact on society, the effects of such reclassifications have broad implications. Disclosure of such information and other information that is subsequently reclassified has many societal benefits that are endangered by this penchant for secrecy.

After September 11th, both the Bush Administration and federal agencies erred on the side of caution rather than risk disclosure of information that could pose harm to the nation’s security.¹⁴⁸ The fact remains, however, that disclosure is the sole means by which an agency can promote public awareness. Critics of agency non-disclosure have argued that it was the secrecy of agencies like the Central Intelligence Agency and Federal Bureau of Investigation that led to the events of September 11, 2001.¹⁴⁹ It was argued that had agencies been more open about what they knew, the public’s input could have helped the agencies connect the dots, revealing al Qaeda’s plan for the September 11th attacks. These arguments gained acceptance when the 9/11 Commission concluded that only “publicity” could have “derailed the attacks.”¹⁵⁰

Such assertions by the Commission seem at odds with increasing instances of agencies reclaiming documents from the public sphere. Although the disclosure of Cold War missile numbers is unlikely to have much impact on public awareness, the likelihood is high that

¹⁴⁷ *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 836 (D.C. Cir. 2001) (citing *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996)).

¹⁴⁸ See *supra* note 45 and accompanying text.

¹⁴⁹ See, e.g., Martin E. Halstuk, *Holding the Spymasters Accountable After 9/11: A Proposed Model for CIA Disclosure Requirements Under the Freedom of Information Act*, 27 HASTINGS COMM. & ENT. L.J. 79, 84–85 (2004).

¹⁵⁰ 9/11 COMMISSION, *supra* note 94, at 247, 276, 541 n.107.

other information that *would* impact public awareness might be or already has been removed from the public purview. Such agency practices only hurt rather than help the fight against terrorism. By attempting to reclaim information from the public domain, agencies will only succeed in impeding public access to important information that could ultimately help thwart a future terrorist attack.

Disclosure not only promotes public awareness, it allows journalists and independent organizations the ability to investigate the activities of government departments and agencies.¹⁵¹ However, the executive branch's affinity for secrecy makes it increasingly difficult for journalists and other organizations to do their jobs. Al Cross of the Society of Professional Journalists once stated that because of such secrecy, journalists have found it "increasingly difficult to fulfill their role as watchdogs."¹⁵² While agency attempts to remove information from the public domain are unlikely to ultimately succeed, they do impede deadline-oriented journalists by making the hunt for information more difficult and time-consuming.

Although FOIA has widely become associated with the media, research shows that the media are the least likely to file a FOIA request when they want information.¹⁵³ According to reporters, it simply takes too long to get information through FOIA when they are working on deadlines.¹⁵⁴ Instead, as one study suggests, FOIA has become a critical tool for businesses seeking government information and companies conducting competitive research.¹⁵⁵ A recent study of more than 6,400 FOIA requests conducted by the Coalition of Journalists for Open Government showed that businesses made about two-thirds of FOIA requests to 20 departments and agencies.¹⁵⁶ One-

¹⁵¹ STEINBERG, *supra* note 6, at 20; DADGE, *supra* note 6, at 148.

¹⁵² FreedomForum.org, Panelists Tell Editors: Congressional Efforts to Protect Freedom May Thwart it (Oct. 15, 2001), <http://www.freedomforum.org/templates/document.asp?documentID=15152>.

¹⁵³ Coalition of Journalists for Open Government, *Frequent Filers: Businesses Make FOIA their Business* (July 3, 2006), available at http://www.citizen.org/documents/Frequent_Filers_FINAL.pdf [hereinafter *Frequent Filers*] (finding that media requests accounted for just six percent of the total requested documents in its study).

¹⁵⁴ *Id.* ("Many reporters say it takes too long to get information through FOIA to make it a meaningful tool for newsgathering. It is used more frequently by journalists working on longer, investigative projects.").

¹⁵⁵ *Id.*; STEINBERG, *supra* note 6, at 20.

¹⁵⁶ *Frequent Filers*, *supra* note 153.

fourth of those requests were placed by professional data brokers who sought information for clients ranging from information on asbestos levels on old Navy ships to cockpit recordings from airplane crashes to background data on prospective employees.¹⁵⁷

The ability to access such documents not only fosters competitiveness in business, it allows a business to obtain information to assist the business in complying with the law, to help it respond to an inquiry or investigation, and to aid in efforts to shape policies and influence agency decisions.¹⁵⁸ Further, it allows a business to obtain information compiled by the government that may be valuable and marketable by the requester.¹⁵⁹ Fostering competitiveness, developing new technology, and assisting law-abiding businesses are all benefits of disclosure. By limiting access to this information through the reclassification of documents already in the public domain, there is no question that business use of FOIA will be greatly impacted. Documents will no longer be readily accessible, making it increasingly difficult for companies to conduct one of the basic steps in their research. Furthermore, without access to this information, it is likely that the cost of doing business will increase as businesses will be required to operate under the risk created by the lack of information transparency.

In addition, withdrawal of information from the public sphere can have a drastic effect on scientific and medical research.¹⁶⁰ In January 2002, when the Bush Administration began removing more than 6,600 technical documents from the public sphere, many scientists feared that such practices would erode the foundations of American science.¹⁶¹ The documents removed mainly dealt with the production of germ and chemical weapons and were found not only in reports from the 1940s to the 1960s that had been declassified and freely available to the public before their removal, but also more modern reports that had previously been judged to contain no secret material.¹⁶² Some scientists expressed fears that government officials

¹⁵⁷ *Id.*

¹⁵⁸ Susman & Hammitt, *supra* note 18, at A-8 to -10.

¹⁵⁹ *Id.*

¹⁶⁰ DADGE, *supra* note 6, at 150; Broad, *supra* note 9.

¹⁶¹ Broad, *supra* note 9.

¹⁶² *Id.*

eager to remove these documents from the public domain would overlook how these types of documents on dangerous substances could produce cures, disease antidotes and surprise discoveries. As then president of the Federation of American Societies for Experimental Biology Robert R. Rich said: "It comes down to a risk-benefit ratio. I think the risk of forgone advances is much greater than the information getting into the wrong hands."¹⁶³

While the availability of such documents could cause information to potentially fall into the wrong hands, removing the documents from the public domain is impossible when they have been available for too long. Rather than deterring the determined terrorist, the removal of these documents from the public domain is more likely to inhibit scientific and medical research. The resolute terrorist who knows what he or she is looking for will be able to find the information, regardless of the government's attempts to remove the documents from the public domain. But the scientist or doctor who browses the public domain looking for that missing link in his or her research will likely never find it because it is no longer readily available for viewing.

Finally, the release of documents, particularly those more than twenty-five years old, strongly impacts how the public views the nation historically. The Clinton mandate for automatic declassification of documents older than twenty-five years was monumental. For the first time, the executive branch wanted to clarify the historical record with the release of documents that would paint the true picture of the nation's history.¹⁶⁴ The release of these sorts of documents does not impede national security; rather, it helps historians develop a more accurate picture of some of the nation's most important events. Suddenly removing these documents from the public domain inhibits historical curiosity and obstructs efforts to correct the historical record, while providing little benefit to national security interests.

3. JUDICIAL ECONOMY

In addition to the difficulty in fully removing information already disclosed from the public domain, and the negative impacts on society of removing such information, the effects of this reclassification practice will eventually be felt by the judiciary as well.

¹⁶³ *Id.*

¹⁶⁴ See *supra* notes 36–37 and accompanying text.

In litigation, FOIA requests are often used as an adjunct to civil and criminal discovery.¹⁶⁵ In the civil context, a potential plaintiff can obtain information through FOIA requests to evaluate his or her case, and; a defendant can obtain relevant documents through FOIA without having to wait until formal discovery commences.¹⁶⁶ In addition, where discovery is limited in scope, FOIA may provide the only avenue for obtaining important information.¹⁶⁷ In the criminal context, FOIA can be used for a variety of purposes, which include: obtaining information used by prosecutors, obtaining documents underlying the criminal charges, and documents that explain the basis for the criminal charges.¹⁶⁸ FOIA can also serve as a critical tool in a criminal case when discovery is much more restricted.¹⁶⁹ By restricting access to information through reclassification, FOIA begins to lose its effectiveness as a tool in litigation.¹⁷⁰

Further, the act of reclassification itself is likely to result in litigation. If someone files a FOIA request and information is improperly withheld, he or she has a statutory right to compel disclosure.¹⁷¹ It is no secret that it usually takes a significant amount of time to reach a resolution where FOIA is concerned. Due to agency backlogs and other logistical issues, FOIA litigation typically takes months, if not years, to reach a resolution.¹⁷² Unnecessary reclassification of information already in the public domain not only wastes the litigant's resources, but also causes even more agency backlog and wastes the court's time and energy. If stricter standards for reclassifying documents in the public domain existed, agencies

¹⁶⁵ See Susman & Hammitt, *supra* note 18, at A-9; GIDIERE, *supra* note 18, at 331-34.

¹⁶⁶ Susman & Hammitt, *supra* note 18, at A-9.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ For more information on how courts have handled the use of FOIA as an adjunct to discovery, see George K. Chamberlin, Annotation, *Use of Freedom of Information Act (5 U.S.C.A. § 552) as Substitute for, or as Means of, Supplementing Discovery Procedures Available to Litigants in Federal Civil, Criminal, or Administrative Proceedings*, 57 A.L.R. Fed. 903 (1982).

¹⁷¹ 5 U.S.C. § 552(a)(4)(B) (2006).

¹⁷² Susman & Hammitt, *supra* note 18, at A-39 to -40.

would not engage in this practice as much, and challenges would more than likely be resolved before they reached the courts.

IV. POSSIBLE WAYS TO RESTRICT EXECUTIVE AUTHORITY TO RECLASSIFY DOCUMENTS ALREADY IN THE PUBLIC DOMAIN

The problem of improper reclassification is caused by a combination of factors: inadequate safeguards against such reclassifications within the governing Executive Order, insufficient oversight of agency reclassification decisions, and consistent, yet misplaced, judicial deference to Exemption 1 decisions. While it is easy to articulate the problem, it is more difficult to offer a proper solution. The best solution will be one that successfully balances the government's need to protect national security and the public's need to know. Although it is unlikely that such a perfect balance will ever be achieved, there are changes that could be made to the system to prevent erroneous reclassifications of information that is already in the public domain.

A. CHANGES WITHIN THE CURRENT SYSTEM

William Leonard, the head of Information Security Oversight Office, asserts that the faults with the reclassification system are not the product of unnecessary secrecy; rather, he claims that they are the result of inadequate training.¹⁷³ Further, Leonard states that incorrect classification decisions are the result of the "lack of proactive oversight within agencies or a lack of effective training and awareness provided to some cleared personnel."¹⁷⁴ Given the executive branch's movement towards secrecy, it is difficult to believe that these removals are simply the product of inadequate training. Granted, with more effective training, it is likely that there will be fewer instances of truly erroneous reclassifications. But such training is still unlikely to cure the inadequacies of the reclassification procedures set forth in the Bush Order. Within the Bush procedures, the burden to change this agency practice will fall on the executive branch and the agencies themselves. For example, every agency could begin by establishing a database that is capable of tracking all agency declassifications and the locations where the declassified documents have been published.

¹⁷³ *Too Many Secrets*, *supra* note 23.

¹⁷⁴ *Id.*

Then, the agency could formulate regulations that limit the amount of time the agency has to reclassify information already available in the public domain. Once the time limit expires, it is unlikely that the information can reasonably be recovered, and thus, the agency should be barred from reclassifying the information.

Further, the agency should research before simply taking information out of the public domain. In August 2006, the D.C. Circuit was presented with a case where the FBI refused to disclose audio tapes of a conversation between two men that was more than twenty-five years old.¹⁷⁵ The FBI claimed that for privacy reasons, it could not disclose the tapes unless both men participating in the conversation were deceased, and that it was unable to ascertain whether the men were dead or alive.¹⁷⁶ In the opinion, D.C. Circuit Judge Merrick B. Garland chastised the FBI for not “Googling” the names of the two men. Garland asks the rhetorical question: “Why, in short, doesn’t the FBI just Google the two names? Surely, in the Internet age, a ‘reasonable alternative’ for finding out whether a prominent person is dead is to use Google (or any other search engine) to find a report of that person’s death.”¹⁷⁷

While this was not a case dealing with a reclassification decision, the same reasoning from Judge Garland’s opinion should apply to cases of reclassification. It takes little if any time to conduct a preliminary search to see how much the questioned document has infiltrated the Internet. If the document is easily accessible, then the document should not be removed.

B. CASE LAW STANDARD

Although the judiciary recognizes the problem of reclassifying documents that are already available in the public domain, the standard developed by the courts to deal with the problem has proven to be unworkable.¹⁷⁸ Working within the court’s current framework, a number of changes could be made to facilitate the disclosure of erroneously reclassified information.

¹⁷⁵ *Davis v. Dep’t of Justice*, 460 F.3d 92, 95 (D.C. Cir. 2006) (reviewing District Court’s grant of summary judgment in favor of FBI, which had previously denied plaintiff’s FOIA request for numerous audio tapes on privacy grounds).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 102.

¹⁷⁸ *See supra* Part III.B.

First, the court should not limit the rule to only those documents that have been “officially disclosed” by the agency. While the requester should have to show that the document was in the public domain at one time, subsequent reproductions of the document by other sources should be enough to require the agency to honor FOIA request.

Second, instead of placing the burden on the requester, the agency should have the burden of proof to show that the information cannot be readily accessed on the Internet. Because the agency knows what information the document contains, it is in the best position to search its own records for information regarding previous disclosures. It is also in the best position to conduct a comprehensive search of the Internet for reproductions.

Finally, the initiator of a FOIA request should not be held to the most stringent prongs of the test: those requiring that the information be as “specific” and “match” the information previously disclosed. The initiator should have to provide information that is specific enough to show that the document was available at one time. For instance, a FOIA requester should articulate the location of the information, the date the information was accessed, and a general description of the information itself. If a FOIA requester can provide such information, and the agency still refuses to disclose the documents, the judicial branch should engage in in-camera review as permitted by the FOIA.¹⁷⁹

While it is unlikely that these changes will lead to the disclosure of erroneously reclassified documents, it will likely increase a requester’s chance of prevailing on a reclassification claim in court. Rather than trying to restructure the current framework to achieve minimal success, the court should implement a formula that more properly addresses the countervailing interests and engages the court in more rigorous review.

When formulating this more rigorous review standard, the judiciary’s handling of an analogous situation is instructive. Rule 26(c) of the Federal Rules of Civil Procedure gives federal district judges broad discretion to design protective orders, upon a showing of “good cause” and as “justice requires” to protect “a party or person from annoyance, embarrassment, oppression, or undue burden or

¹⁷⁹ 5 U.S.C. § 552(a)(4)(B) (2006) (“On complaint, . . . the court . . . may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section . . .”).

expense.”¹⁸⁰ Although the majority of requests for protective orders arise during the discovery stage, there are occasions when such requests are made after the materials at issue have been received into evidence in open court.¹⁸¹ These post-evidentiary requests have required the judiciary to formulate a standard that balances the public’s right of access, which was recognized in the criminal context by the Supreme Court in *Nixon v. Warner Communications*, and the interests of the party requesting the protective order.¹⁸²

Unable to reach a consensus, the circuit courts that have addressed this issue take one of three approaches, all of which differ in the weight given to the public’s right of access.¹⁸³ Many circuit courts, specifically the First, Second, Fourth, Sixth, Tenth and Eleventh Circuits, adopt the view that the presumption in favor of the right of public access is all but conclusive on the issue of possible protective orders, such that a protective order for material already entered into evidence in open court may be obtained only under “extraordinary circumstances” or where there is a “compelling reason” for such protection.¹⁸⁴ The second approach, followed by the Third, Seventh,

¹⁸⁰ FED. R. CIV. P. 26(c).

¹⁸¹ Russell G. Donaldson, Annotation, *Propriety and Scope of Protective Order against Disclosure of Material Already Entered into Evidence in Federal Court Trial*, 138 A.L.R. FED. 153, § 2a (1997).

¹⁸² *Nixon v. Warner Commc’ns Inc.*, 435 U.S. 589, 597–98 (1978) (“[C]ourts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. . . . The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen’s desire to keep a watchful eye on the workings of public agencies. . . . [But] the right to inspect and copy judicial records is not absolute.”). Although *Nixon* recognized the public’s right of access, there is authority applying such logic to the civil context. See Donaldson, *supra* note 181, § 3.

¹⁸³ Donaldson, *supra* note 181, § 2a.

¹⁸⁴ *Poliquin v. Garden Way*, 989 F.2d 527, 533 (1st Cir. 1993) (“[O]nly the most compelling showing can justify post-trial restriction on disclosure of testimony or documents actually introduced at trial.”); *United States v. Myers (In re Application of NBC)*, 635 F.2d 945, 952 (2d Cir. 1980) (“[I]t would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence.”); *In re Assoc’d Press*, 172 F. App’x 1, 5 (4th Cir. 2006) (adhering to “extraordinary circumstances” test); *United States v. Beckham*, 789 F.2d 401, 414 (6th Cir. 1986) (“When a deprivation of access to information occurs due to an exclusion from judicial records, the constitutional right to know is implicated, and it is then appropriate that this court undertake a stringent review of the lower court’s decision. . . . Under such circumstances, where the public is barred from learning the facts of a dispute, ‘only the most compelling reasons can justify non-disclosure of judicial records.’” (quoting *In re Knoxville News-Sentinel, Co. Inc.*, 723 F.2d 470, 476 (6th Cir. 1983))); *Wilson v. Am.*

Ninth, and D.C. Circuits, endorses the view that while the presumption in favor of public access is “strong,” it may be less than decisive.¹⁸⁵ The third and final approach, adopted by the Fifth and Eighth Circuits, views the presumption of access as one of many factors to be weighed by the trial court.¹⁸⁶

The circuit courts adopting the “all-but-conclusive” standard do so upon recognition that the public’s right of access is essential for the public to have confidence “that justice is being done by its courts in all matters.”¹⁸⁷ Accordingly, courts rigorously guard the presumption in favor of this right of access when a protective order is sought.¹⁸⁸ Yet, when a strikingly similar interest is at issue in the FOIA context—ensuring that government is acting honestly and in the best interests of its people—courts adopt a presumption *against* the right of access and place almost insurmountable hurdles before those seeking

Motor Corp., 759 F.2d 1568, 1571 (11th Cir. 1985) (“[W]here, as in the present case, the [court] attempts to deny access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to that interest.” (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606–07 (1982))). While there is no clear formula for determining what constitutes “extraordinary circumstances” or a “compelling reason,” the courts have provided some guidance. See *Poliquin*, 989 F.2d at 533 (“[Without more], commercial embarrassment is not a ‘compelling reason’ to seal a trial record.”); *In re Knoxville News-Sentinel* 723 F.2d at 478 (“[P]rivacy rights of participants and third parties’ are among those interests which, in appropriate cases, can limit the presumptive right of access to judicial records.” (quoting *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983))).

¹⁸⁵ *United States v. Criden* (*In re Application of NBC*), 648 F.2d 814, 823 (3d Cir. 1981) (“[T]here is a strong presumption that material introduced into evidence at trial should be made reasonably accessible in a manner suitable for copying and broader dissemination.”); *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982) (“[T]here is a strong presumption in support of the common law right to inspect and copy judicial records.”); *Valley Broadcasting Co. v. Dist. Court for Dist. of Nev.*, 798 F.2d 1289, 1294 (9th Cir. 1986) (“[T]here is a strong presumption in support of the common law right to inspect and copy judicial records.”); *United States v. Hubbard*, 650 F.2d 293, 317 (D.C. Cir. 1980) (“strong presumption in favor of public access”).

¹⁸⁶ *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 434 (5th Cir. 1981) (holding that the presumption in favor of public access to judicial records is one of the interests to be weighed, and the simple existence of the right is not conclusive); *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (declining to adopt the “strong presumption” view and adopting Fifth Circuit view that presumption of access is one of many factors).

¹⁸⁷ *Poliquin*, 989 F.2d at 533.

¹⁸⁸ See *supra* note 184.

disclosure of documents that have been reclassified.¹⁸⁹ Since proponents of these protective orders are subject to such a strict standard for the purpose of ensuring that the public knows justice is being served in the courts, so too should a federal agency seeking to reclassify public information be subject to a similar strict standard to ensure that the public knows justice is being served by the federal government. Rather than adopting the current counter-intuitive standard, courts should apply a similar "all-but-conclusive" standard when they deal with requests for reclassified information. If national security is truly at issue and would be jeopardized by the re-release of the information, it will be entitled to protection as an "extraordinary circumstance" or "compelling reason."

In addition, such a presumption in favor of the right of access would require agencies to show that the information has not been previously disclosed, thereby placing the burden on the party best equipped to meet the burden. This approach strikes a better balance than the current approach. Not only would the presumption in favor of the right of access result in the dissemination of documents that rightly belong in the public domain; it would also still protect information that truly endangers national security.

Although the "all-but-conclusive" standard seems to achieve the best balance of interests, even the "strong presumption" approach would pose a better solution than the approach currently utilized by courts. The "strong presumption" approach recognizes the "strong" presumption in favor of the right of access, but also takes into account other factors that should garner the court's consideration.¹⁹⁰ The factors relevant to this discussion include: (1) the degree of legitimate public interest in the information¹⁹¹; (2) potential for risk to national or other governmental security¹⁹²; (3) prior access to materials¹⁹³; and

¹⁸⁹ See *supra* Part III.B.

¹⁹⁰ See *supra* note 185.

¹⁹¹ See, e.g., *United States v. Criden* (*In re Application of NBC*), 648 F.2d 814, 822 (3d Cir. 1981) (reasoning that where "the actions of the indicted elected officials, the conduct of the law enforcement agencies, and the court's decision to set aside the convictions combine to create legitimate public interest in the proceedings far beyond the usual criminal case" dissemination is highly favored); *United States v. Myers* (*In re Application of NBC*), 635 F.2d 945, 952 (2d Cir. 1980) ("The presumption [in favor of public access] is especially strong in a case like this where the evidence shows the actions of public officials, both the defendants and law enforcement personnel.").

¹⁹² Although research does not yield any case in which a court has issued a protective order to prevent potential harm to national or other governmental security, some courts have hinted that a court may consider the potential harm as a factor in its determination. See,

(4) inadequacy of alternatives to protect interests served by the protective order.¹⁹⁴

While the presumption in favor of the right of access would still be strong, these factors could be considered by courts when reviewing whether an agency reclassification is proper. Although this approach would lead to less-frequent disclosures of reclassified information, it would still lead to more disclosures than the current approach.

The “mere factor” approach, for the reasons it is not adhered to by a majority of the circuit courts in the protective order context, is unlikely to change the net result of the current standard. As one factor in a multi-factored analysis, the right of access would often be trumped by national security concerns.

Whichever approach courts take, the information ultimately protected must truly endanger national security. Although courts have historically shown significant deference when it comes to Exemption 1 decisions, reclassification of information in the public domain is a new issue that is dramatically different from the cases under which courts developed the current deferential approach. Federal agencies should not be given unfettered discretion to make reclassification decisions and then be permitted to rely on out-of-context judicial standards to sandbag the courts into protecting information that is reclassified for the sole purpose of unnecessary secrecy. In the same manner that the reviewing courts require with protective orders, the protected information must be narrowly tailored

e.g., *Poliquin v. Garden Way*, 989 F.2d 527, 533 (1st Cir. 1993) (citing national security as one of the rare exceptions where material introduced at trial may be safeguarded against subsequent disclosure).

¹⁹³ Courts have held that prior access to information by the party requesting dissemination is a factor favoring further release of the materials. *See, e.g.*, *Myers*, 635 F.2d at 952 (“Once the evidence has become known to the members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.”); *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (endorsing district court’s consideration of certain factors, including the fact that the news media had attended the trial and pre-trial hearings, had reported the events of the trial to the public, and had received transcripts of the tapes); *United States v. Rosenthal*, 763 F.2d 1291, 1294 (11th Cir. 1985) (acknowledging as a factor “whether the press has already been permitted substantial access to the contents of the records”).

¹⁹⁴ *See, e.g.*, *Nat’l Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 425 (6th Cir. 1981) (“[T]here must be no alternative means of protecting the public interest which intrudes less directly on expression.”).

to impose the minimum restraint necessary to protect the interest concerned.¹⁹⁵

C. POSSIBLE LEGISLATIVE CHANGES

While reworking the current scheme and offering requesters more protection in judicial review of FOIA requests would provide better protection against this practice than the practices currently in place, legislative action is by far the best way to curb the increasing number of reclassifications. Not only does the legislature have the ability to engage in more meaningful and rigorous discussion on the matter, it also has the ability to restrict the discretion left to agencies by the Bush Order. Although there is no existing provision in FOIA for legislative review of the controlling Executive Order or memorandum, changes can be implemented through amendments to the Act itself or new legislation that seeks to limit agency discretion when it attempts to reclassify documents already in the public domain.¹⁹⁶

In August 2007, Congress took an important step toward increasing public access to documents and limiting agency discretion in general by passing the OPEN Government Act of 2007.¹⁹⁷ The Act created the Office of Government Information Services ("OGIS"), a new division within the National Archives and Records Administration to be headed by a FOIA ombudsman who would have been responsible for, *inter alia*, mediating FOIA disputes and monitoring agency implementation of FOIA.¹⁹⁸ However, despite signing the law in December 2007, President Bush failed to fund the

¹⁹⁵ See *id.* ("The restraining order must be narrowly drawn and precise."); *United States v. Beckham*, 789 F.2d 401, 414 (6th Cir. 1986) ("trial court's discretion [to deny access] must be narrowly restricted.").

¹⁹⁶ Despite efforts in the 108th and 109th Congresses to reverse the effect of the Bush Executive Order, and the Ashcroft and Card memoranda, such efforts have been largely unsuccessful. See *Restore Open Government Act of 2004*, H.R. 5073, 108th Cong. (2004) (creating a presumption in favor of disclosure and expressly repudiating the Ashcroft and Card memoranda); *Restore Open Government Act of 2005*, H.R. 2331, 109th Cong. (2005) (reintroducing *Restore Open Government Act of 2004*). See also *OPEN Government Act of 2005*, S. 394, 109th Cong. (2005); *Faster FOIA Act of 2005*, S. 589, 109th Cong. (2005).

¹⁹⁷ *OPEN Government Act of 2007*, S. 2488, 110th Cong. (2007) (enacted), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s2488enr.txt.pdf.

¹⁹⁸ *Id.* § 10.

program in his 2009 budget proposal, and proposed shifting the ombudsman's position to the Department of Justice.¹⁹⁹

Senator Patrick J. Leahy called the move a blatant attempt by President Bush "to act contrary to the express intent of Congress" in light of the fact that he and Senator John Cornyn "intentionally placed this critical office in the National Archive, so that OGIS would be free from the influence of the Federal agency that litigates FOIA disputes—the Department of Justice."²⁰⁰ It is undisputable that OGIS would have helped prevent agency reclassification practices. With an independent, non-political watchdog overseeing agency classifications, agencies might have been more hesitant when making improper reclassification decisions in the first place. In addition, the mediation aspect of OGIS would have provided FOIA requesters who were improperly denied access to declassified information with an expeditious resolution of their dispute. It is unclear what will happen with OGIS and FOIA ombudsman, but the provisions of the Act are an important step in the effort to stop improper reclassification practices.²⁰¹

The OPEN Government Act of 2007, however, is just one of many necessary steps to ensure that agency reclassification decisions are curtailed. Even assuming that Senator Leahy successfully secures funding for the OGIS, Congress should further amend FOIA to limit agency discretion to reclassify information already in the public domain. While this Comment deals primarily with reclassifications under Exemption 1, it is likely that documents are being reclassified under other exemptions as well. Yet there is no provision in FOIA legislation itself forbidding agencies from reclassifying documents after they have been in the public domain. If the legislature were to amend FOIA to impose its own restrictions on reclassification, it would first need to define "public disclosure" more broadly than the courts have defined it in the past.²⁰²

¹⁹⁹ Elizabeth Williamson, *Is Ombudsman Already in Jeopardy? Bush Proposes Moving Post from Archives to Justice Dept.*, WASH. POST, Feb. 6, 2008, at A17.

²⁰⁰ Statement of Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, Call for Full Funding of the Office of Government Information Services, <http://leahy.senate.gov/press/200802/021408a.html> (last visited Mar. 28, 2008).

²⁰¹ In his statement, Senator Leahy vowed that the OGIS would be "promptly established and fully funded within the National Archives." *Id.*

²⁰² See *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983); *Founding Church of Scientology of Wash., D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 831–32 (D.C. Cir. 1979) ("Well publicized . . ."); *Lamont v. Dep't of Justice*, 475 F. Supp. 761, 772 (S.D.N.Y. 1979)

While expounding on its Public Domain Doctrine, the judiciary failed to take into account the pervasiveness of the Internet. In 2001, the D.C. Circuit conceded that “a disclosure made to any FOIA requester is effectively a disclosure to the world at large,” and that there is no authority to “limit the dissemination of the documents that are released under FOIA, or to choose selectively among recipients.”²⁰³ Surely this reasoning can be applied when information is disclosed on the Internet as well. In addition, the provision would need to set a time limit on an agency’s ability to reclassify once information is released into the public domain. Finally, the provision should include *de novo* review with minimal deference given to the agency where the requester offers adequate proof—the location of the information, the date the information was accessed, and a general description of the information itself—that the information was previously in the public domain but has been subsequently removed.

Allowing the executive branch to determine the appropriate reclassification procedures is not acceptable when the executive branch often has ulterior motives that favor secrecy over disclosure. An amendment to FOIA itself would allow the legislature to take a firm stand on a practice that is dangerously undermining FOIA. The Bush Order provides fairly vague restrictions on reclassification; whereas, a legislative amendment to FOIA would provide agencies with clear guidelines that will ultimately reduce the ability of federal agencies to remove information from the public domain in the first place. Such legislative action is needed to send agencies a clear message that reclassifying documents and removing them from the public domain are not actions intended by those who fought for FOIA.

V. CONCLUSION

Since its inception, FOIA has had to strike a complex balance between national security concerns and public disclosure. Achieving this balance became even more difficult when terrorists attacked America on American soil.²⁰⁴ On September 11th, America learned that it is not invincible. In the age of terrorism, it is absolutely necessary to protect national security. But legitimately protecting the

(“Specifically revealed to the public . . .”); *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (“[d]isclosed and preserved in a permanent public record”); *Davis v. Dep’t of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (“officially acknowledged” or in the “public domain”).

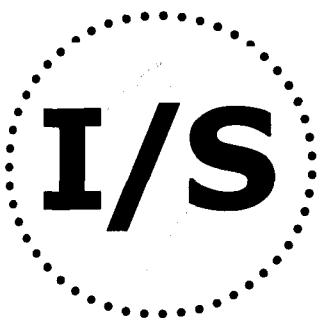
²⁰³ *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 836 (D.C. Cir. 2001).

²⁰⁴ See *FOIA Hearing*, *supra* note 13.

nation's security is far different from unnecessary secrecy. If security within America's boundaries comes at the price of the right to an open and honest government, then the terrorists win. As the 9/11 Commission concluded, only "publicity" could have "derailed the attacks."²⁰⁵ The Commission's purpose was to determine what led to the terrorist attacks. The proper response to its findings is more openness, not more secrecy.

Few papers carried the story about the Cold War missile blackout. In fact, there has been very little media coverage on the increasing reclassification of documents already in the public domain. Such practices pose a grave danger to FOIA with little or no benefit to national security. It is important that a strict stance is taken against agency practices implementing an unnecessary degree of secrecy. Without a strong stance, America stands to lose much more than FOIA.

²⁰⁵ 9/11 COMMISSION, *supra* note 94, at 247, 276, 541 n.107.



A Journal of Law and Policy for the Information Society

Sponsored by



Moritz
College of Law

The Moritz College of Law
The Ohio State University
Drinko Hall, Room 169
55 West 12th Avenue
Columbus, OH 43210

Carnegie Mellon
Policy • Management •
Information Technology **Heinz School**

H. John Heinz III School of
Public Policy and Public
Management
Carnegie Mellon University
Hamburg Hall 1108
5000 Forbes Avenue
Pittsburgh, PA 15213-3890

Please Visit the **I/S** Website to Subscribe
Electronically:

is-journal.org

Please subscribe me or my organization to:
I/S: A JOURNAL OF LAW AND POLICY FOR THE INFORMATION SOCIETY

Name: _____

Organization: _____

Address: _____

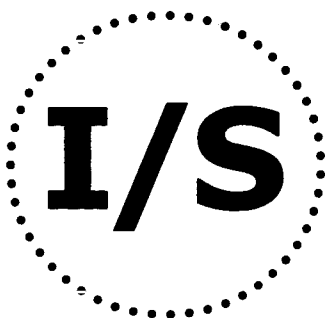
City: _____ State: _____ Zip Code: _____ Country: _____

Telephone: _____ Fax: _____ Email: _____

Annual Volume Subscription Type (please circle one):

Domestic (\$45) – Student w/ID (\$25)		Foreign (\$100)	
Institutional (\$100)		Supporting (\$150)	

To make payment now, please enclose check in separate envelope payable to: **"I/S JOURNAL"**



A Journal of Law and Policy for the Information Society

Published by



The Center for Interdisciplinary Law and Policy Studies
The Ohio State University
Drinko Hall
55 West 12th Avenue
Columbus, Ohio 43210

Please Visit the **I/S** Website to Subscribe
Electronically:

is-journal.org

Place Stamp Here
Post Office
Will Not Deliver
Mail Without
Postage

BUSINESS REPLY CARD

I/S: A JOURNAL OF LAW AND POLICY FOR THE INFORMATION SOCIETY

ATTN: I/S JOURNAL
The Ohio State University
Moritz College of Law
55 West 12th Avenue
Columbus, OH 43210